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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 768

EDMUND D. OSBOURNE, ET AL., *Appellants,*

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL., *Appellees.*

**On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division**

## MOTION TO DISMISS OR AFFIRM

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November 27, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Pursuant to Rules 14, Paragraph 2; 58, Paragraph 4; and 16(1)(c) of the Rules of this Court, Mississippi Valley Barge Line Company, American Commercial Lines, Inc., and Union Barge Line Corporation, protestants before the Interstate Commerce Commission and plaintiffs in the District Court, move that this appeal be dismissed, or in the alternative, that the judgment of the District Court be affirmed.

## STATEMENT

This is a direct appeal from an order, among others, of the United States District Court for the Eastern District of Missouri, Eastern Division, dated July 31, 1967 (J.S. 43-46)[1] which order, among other things, enjoined water-carrier operations under Water Carrier Certificate No. W-364 by appellants, Edmund D. Osbourne and Pittsburgh Towing Company. This order was entered to enforce the order and judgment of the same three-judge district court in *Mississippi Valley Barge Line Company, et al.* v. *United States, et al.*, 252 F. Supp. 162 (E.D. Mo. March 25, 1966) (J.S. 49-60). An appeal from this earlier decision was dismissed by this Court on November 7, 1966, *per curiam,* for failure to make timely docketing, October Term, 1966, No. 319 *Pittsburgh Towing Company* v. *Mississippi Valley Barge Line Company, et al.*, 385 U.S. 52, 17 L.Ed. 31, 87 S. Ct. 195, *rehearing denied,* December 5, 1966, 385 U.S. 995. Although the instant appeal purports to seek reversal of the district court's July 31, 1967 enforcement order only, appellants' jurisdictional statement again attempts to place at issue the district court's prior decision of March 25, 1966 (J.S. 4-5, Issue No. 7; J.S. 23-25), despite this Court's prior dismissal and denial of rehearing of an appeal involving the same decision.

The district court's enforcement order of July 31, 1967 was based upon that court's express findings that its earlier decree was being violated. (J.S. 40, 44-45). In said earlier decree, dated March 25, 1966, the district court unanimously found that the Commission's trans-

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[1] References to appellants' jurisdictional statement will be designated as "J.S. ——."

fer regulations had been effectively circumvented in obtaining Interstate Commerce Commission approval of the transfer of Certificate W-364 from Charles Zubik to the Pittsburgh Towing Company, the undisclosed purpose of the transaction being to transfer the certificate to one Edmund D. Osbourne without complying with the Commission's regulations. (J.S. 55-56). Pittsburgh Towing was found to be a "corporate device" to transfer the certificate from Zubik to Osbourne "without subjecting themselves to the procedure specifically created for examining applications for transfer of ownership" of the certificate. (J.S. 56).

The district court found clear evidence of an attempt to deceive the Commission through concealment of information and further found that deceit had been perpetrated by Zubik in notifying his competitors that only a change in form of ownership was involved in the transfer. (J.S. 53-54, 55-56, 57-58). In addition, the district court found that the requirements of the Commission's transfer regulations had not been met in other respects, such as failure to establish the transferee's fitness and ability to conduct the operations authorized and to make the showing required in the transfer of a dormant certificate. (J.S. 57, 54-55). Based on these and other findings, the district court set aside, annulled and suspended the Commission's orders, authorizing the transfer, dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965.[2] The district court permanently enjoined the Commission from transferring the certificate to Pittsburgh Towing,

[2] The district court's action in setting aside these orders is alleged as error in the jurisdictional statement herein. (J.S. 4-5, Issue No. 7).

as authorized by said orders. This order became final when rehearing of an appeal therefrom was denied by this Court on December 5, 1966. In response to the district court's order, the Commission, in an order served January 17, 1967, set aside its prior orders authorizing the transfer, ordered Pittsburgh Towing's tariff stricken from its files and further ordered Pittsburgh Towing to refrain from conducting operations under such tariffs. (J.S. 61-63)

According to the findings of the district court in its enforcement order of July 31, 1967, Osbourne and the executors of the Zubik estate[3] engaged in a series of transactions, beginning January 10, 1967, which effectively nullified the district court's order of March 25, 1966 and the Commission's order of January 17, 1967. The Zubik executors gave Osbourne a power of attorney to file tariffs in their name, and the Pittsburgh Towing tariff was so refiled. The power of attorney in effect authorized Osbourne to conduct operations under the certificate, and an Osbourne-owned corporation, Western Rivers Corporation, by contract dated January 6, 1967, undertook management and operations under certificate W-364, with an Osbourne employee acting as office manager. (J.S. 37) Osbourne personally assumed responsibility for any operating losses, and the Zubik estate-Osbourne agreement was in some respects a partnership agreement. (J.S. 38-39).

From these and other findings, the district court, in the enforcement order under review, unanimously concluded that Osbourne had not ceased his illegal opera-

[3] Charles Zubik died on August 25, 1966, while the aforementioned appeal to this Court was pending. The Zubik estate executors thereupon adopted the Zubik-Osbourne transaction. (J.S. 35)

tion under Certificate W-364[4] and that he was, through the Zubik executors, "employing but another subterfuge, as he previously did with Pittsburgh Towing Company, to avoid compliance with the decree of this court and with the judgment and order of the Commission." (J.S. 40) The district court thereupon granted a motion by the United States and the Commission to enforce the court's prior order of March 25, 1966, and in the order here under review enjoined Osbourne and Pittsburgh Towing from conducting operations under Certificate W-364, and further enjoined the Zubik executors from aiding and abetting such operations. (J.S. 43-46) In addition, the district court remanded to the Commission the issue raised by appellees Mississippi Valley, American Commercial and Union as to whether the Zubik estate tariffs should be stricken from the Commission's files. The Commission issued such a striking order on September 11, 1967.[5]

Since the filing of the notice of appeal herein, Charles Zubik, Jr., Executor, and Virginia Drambel Zubik, Executrix, of the estate of Charles Zubik, have filed with the U. S. District Court for the Eastern District of Missouri, Eastern Division, a motion to dismiss the instant appeal "without prejudice to the rights of any other appellant in this litigation." In

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[4] Osbourne had conducted operations under the Commission's order of September 9, 1960 continuously until early 1967. This Commission order was among those set aside by the district court's order of March 25, 1966, which became effective December 5, 1966.

[5] The Commission's striking order expressly permitted the filing of tariffs by the Zubik estate "upon satisfactory proof that the operations to be conducted are in fact those of the duly-authorized representatives of the Estate of Charles Zubik, Sr., Deceased."

addition, these executors have filed with the Commission documents purporting to establish compliance in the filing of tariffs with the district court's order of March 25, 1966 here under review. By order served November 20, 1967 [6] the Commission set the issue of compliance for hearing on December 5, 1967 in Finance Docket 21193 *Pittsburgh Towing Company—Certificate Transfer—Charles Zubik.*

## ARGUMENT

### This Appeal Should Be Dismissed Under Rules 14(2) and 58(4) of This Court's Rules

The instant appeal is essentially an attempt to relitigate the prior appeal which was before this Court in No. 319 *Pittsburgh Towing Company* v. *Mississippi Valley Barge Line Company, et al.,* October Term, 1966, dismissed *per curiam,* 385 U.S. 32, 17 L.Ed. 31, 87 S. Ct. 195, *rehearing denied,* 385 U.S. 955. Precisely the same issue has been raised herein involving the validity of the district court's order setting aside the Commission's orders of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 in Finance Docket 21193 *Pittsburgh Towing Company — Certificate Transfer — Charles Zubik* (See J.S. 4-5, 23-25) This prior appeal was dismissed for failure to comply with the requirements of Rule 13(1) regarding timely docketing of appeals with this Court. Rehearing was denied on December 5, 1966, and Rule 58 Paragraph 4 of the Rules of this Court bars consecutive or untimely petitions for rehearing.

By non-compliance with the district court's prior injunction and by thus compelling that court to issue

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[6] Attached to this motion as Appendix A.

an order enforcing its earlier injunction, appellants Edmund D. Osbourne and Pittsburgh Towing Company again seek to overturn the district court's March 25, 1966 decision. The appellants' jurisdictional statement does not, in seeking to overturn the district court's enforcement order, accept the finality of this Court's denial of a rehearing in appellants' prior appeal. Appellants instead explicitly and directly attack the district court order of March 25, 1966 previously before this Court, both in terms of the Commission's orders reversed thereby and of the scope of the injunction issued. Because the instant appeal does not, by its form, permit a clear-cut severance of the issues involving enforcement as distinguished from the validity of the district court's prior order, the appeal should be dismissed as untimely or as, in effect, a consecutive petition for rehearing.

**Alternatively, Appellees' Motion To Affirm Should Be Granted**

Viewed as involving only the district court's enforcement order, this appeal presents no substantial question warranting plenary consideration by this Court.

The enforcement issues raised on appeal have no general application or importance, and are restricted to an essentially factual inquiry as to whether, on a specific record, there was a violation of the district court's prior order and injunction.[7] Appellants' jurisdictional statement by no means disputes the essential and material facts from which the district court found a circumvention of its earlier injunction. To the extent that it differs from the district court's recital of facts, appellants' Statement of the Case consists primarily of ways in which undoing of the unlawful

[7] Set e.g. Issues 10-13, J.S. 5-6.

Zubik-Osbourne transfer, and compliance with the court's injunction, would disadvantage and inconvenience the appellants. (See e.g. J.S. 11-12) These contentions merely substantiate the district court's findings by establishing motivation for Osbourne's continuing operations under the certificate.

In dealing with the violation of its injunction, the district court was compelled to frame the terms of its order to cope with the enforcement problem before it. The complexity of the relationships found to have been established by Osbourne and the Zubik estate dictated that this injunction be comprehensive, in order to be effective. So viewed, the district court's injunction was reasonably adapted to the problem at hand, and clearly did not exceed the court's authority. Osbourne and the Zubik estate had employed an Osbourne-owned corporation, an Osbourne employee, a power of attorney, a management contract with facets of a partnership agreement, and a special bank account to enable Osbourne to conduct operations under the certificate. The scope of the district court's remedy was compelled by such circumstances.

From the facts found by the district court, it is clear that setting aside the district court's enforcement order will permit a continuing violation of a final injunction of that court. Such action will, as found by the district court, not only inflict irreparable injury upon appellees herein but also result in "the consequent impairment" of "the district court's integrity and the judicial process of the United States of America." (J.S. 41)

The enforcement order of the district court should be affirmed.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed, or in the alternative, that the judgment of the district court should be affirmed.

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November 27, 1967
Washington, D. C.

## APPENDIX A

### Order.

SERVICE DATE
NOVEMBER 20, 1967

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 21193

PITTSBURGH TOWING COMPANY—CERTIFICATE TRANSFER—CHARLES ZUBIK

PRESENT: Kenneth H. Tuggle, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding;

*It is ordered,* That the above-entitled matter be, and it is hereby, referred to Examiner Louis E. Bartoo for further hearing for the purpose of determining whether the operations to be conducted under the Tariff entitled I.C.C. No. 2, Charles Zubik (Charles Zubik, Jr., Executor, and Virginia Zubik Drambel, Executrix) are in fact those of the duly-authorized representatives of the Estate of Charles Zubik, Sr., deceased, on the 5th day of December A. D. 1967, at 9:30 o'clock a.m. United States Standard Time, at the Offices of the Interstate Commerce Commission, Washington, D. C., and for recommendation of an appropriate order thereon, accompanied by the reasons therefor.

Dated at Washington, D. C., this 9th day of November A. D. 1967.

By the Commission, Commissioner Tuggle.

H. NEIL GARSON,
*Secretary.*

(SEAL)